Sri Permata Sdn Bhd v PPH Realty Sdn Bhd (Lingkaran Cemerlang Sdn Bhd, intended intervenors)

HIGH COURT (IPOH) — CIVIL SUIT NO 22–139 OF 2001
ABDULL HAMID EMBONG J
12 OCTOBER 2001

Civil Procedure *— Parties — Intervention — Application for — Test to be applied — Intended intervener's rights to be affected through intermediary — Freezing of housing development account, whether directly affecting turnkey operator — Mere commercial interest — Meaning of 'rights against or liabilities to'*

The plaintiff was the registered owner of a land known as Lot 70065 Mukim Ulu Kinta. Pursuant to an assignment of a joint venture agreement, the defendant was to develop the land into a housing estate ('the project'). By a turnkey agreement, the defendant appointed a turnkey contractor, ie LSSB, to build and complete Phase 1B under the project. A new company, ie LC, the intended intervener, was set up to complete the phase. On 22 May 2001, the plaintiff terminated the joint venture agreement with the defendant and ordered the defendant and LC to stop all work immediately. Upon the plaintiff's application, the court granted an interim injunction restraining the defendant from dealing with the monies deposited in its Housing Development Account ('HDA account') in respect of the project until the disposal of the suit. Consequently, LC applied for leave to intervene in this suit on the ground that the temporary freezing of the HDA account had prejudiced the rights and interests of LC who had a legal interest in phase 1B and was responsible to the defendant to deliver vacant possession of the same to the defendant.

Held, dismissing the application for leave to intervene with costs:

(1) The test to be applied in intervention is whether the intended intervener's rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action (see p 557F). The qualification that the intervening party must have been 'directly affected' by any order made by the court on the subject matter has yet to be interpreted by the courts. However, one cannot be said to be directly affected by an order of court if such affection is brought about by an intermediary (see p 558D–G); *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 and *Soo Hong & Leong Kew Hoi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690 followed.

(2) The issue was whether LC was directly affected by the freezing of the HDA account. LC, although entitled to the monies in the HDA account, and may participate in that account through an intermediary, ie the defendant, was not so directly affected by the court's earlier order. The effect of freezing the HDA account on

LC was merely consequential. LC would certainly be affected by the court's earlier interim order and it may be said that it would inevitably be affected. But, LC would only be indirectly affected by reason of his collateral obligations and rights under its turnkey agreement with the defendant. It seemed that LC's interest was merely a commercial one and this barely sufficed to enjoin it as a party to this action (see pp 559H–560A).

(3) The phrase 'rights against or liabilities to' referred to a right at law and not a right in equity. The argument that LC had an equitable interest in the HDA account was misconceived. LC's rights against the defendant was not affected and LC may choose to pursue it, if and when that need arises. As for its liability, LC did not owe any to the defendant under the circumstances. Its inability to proceed with the project was entirely the fault of the defendant and a consequence of the defendant's breach under the joint venture agreement, for which LC should not be held responsible (see p 560B–D). The intended intervener had not shown that it had met the test formulated in *Pegang Mining* to move the court to exercise its discretion in allowing it to participate in the proceedings (see p 560D).

[Bahasa Malaysia summary

Plaintif adalah tuanpunya berdaftar sebidang tanah yang dikenali sebagai Lot 70065 Mukim Ulu Kinta. Selaras dengan satu penyerahakan perjanjian usahasama, defendan haruslah membangunkan tanah tersebut menjadi sebuah taman perumahan ('projek tersebut"). Melalui satu perjanjian serah kunci (turnkey), defendan telah melantik kontraktor serah kunci, iaitu LSSB, untuk membina dan menyiapkan Fasa 1B di bawah projek tersebut. Sebuah syarikat baru, iaitu LC, pencelah yang dicadangkan, telah ditubuhkan bagi menyiapkan fasa tersebut. Pada 22 Mei 2001, plaintif telah menamatkan perjanjian usahasama dengan defendan dan mengarahkan supaya defendan dan LC menghentikan semua kerja dengan serta-merta. Atas permohonan plaintif, mahkamah telah memberikan satu injunksi interim yang menghalang defendan daripada berurusan dengan wang yang telah didepositkan di dalam Akaun Pembangunan Perumahannya ('akaun HAD tersebut') yang berkaitan dengan projek tersebut sehingga penyelesaian guaman tersebut. Akibatnya, LC telah memohon untuk kebenaran bagi mencelah di dalam guaman ini atas alasan bahawa pembekuan sementara akaun HDA tersebut telah memudaratkan hak dan kepentingan LC yang mempunyai kepentingan sah di dalam fasal 1B dan bertanggungjawab kepada defendan untuk menghantarserahkan milikan kosong fasa 1B kepada defendan.

Diputuskan, menolak permohonan untuk kebenaran bagi mencelah dengan kos:

(1) Ujian yang harus dipakai dalam pencelahan adalah sama ada hak pencelah yang dicadangkan terhadap atau tanggungan-tanggungan kepada mana-mana pihak kepada tindakan tersebut berhubung dengan hal-perkara tindakan tersebut akan terjejas secara langsung oleh mana-mana perintah yang mungkin akan dibuat di dalam tindakan tersebut (lihat ms 557F). Kelayakan bahawa pihak yang mencelah semestinya 'telah terjejas secara langsung' oleh mana-mana perintah yang dibuat oleh mahkamah atas hal perkara tersebut masih belum ditafsirkan oleh mahkamah-mahkamah. Walau bagaimanapun, seseorang tidak boleh diperkatakan sebagai terjejas secara langsung oleh sesuatu perintah mahkamah jika penjejasan yang sedemikian disebabkan oleh seorang pengantara (lihat ms 558D–G); *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 and *Soo Hong & Leong Kew Hoi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690 diikut.

(2) Isunya adalah sama ada LC telah terjejas secara langsung oleh pembekuan akaun HDA tersebut. LC meskipun berhak kepada wang di dalam akaun HDA, dan boleh turut serta di dalam akaun itu melalui seorang pengantara, iaitu defendan, tidak sedemikian terjejas secara langsungnya oleh perintah mahkamah yang lebih awal. Kesan membekukan akaun HDA ke atas LC adalah hanya sampingan sahaja. LC pastinya akan terjejas oleh perintah interim mahkamah yang lebih awal dan boleh diperkatakan bahawa kesudahannya ia akan terjejas. Tetatpi, LC akan hanya terjejas secara tidak langsung disebabkan oleh kewajipan-kewajipan kolateral dan haknya di bawah perjanjian serah kuncinya dengan defendan. Nampaknya kepentingan LC adalah hanya kepentingan perdagangan dan ini tidak memadai untuk menyertakannya sebagai satu pihak kepada tindakan ini (lihat ms 559H–560A).

(3) Ungkapan 'hak terhadap atau tanggungan-tanggungan untuk' merujuk kepada hak undang-undang dan bukannya hak dalam ekuiti. Hujahan bahawa LC mempunyai kepentingan ekuiti di dalam akaun HDA tersebut telah disalah-tafsirkan. Hak LC terhadap defendan telah tidak terjejas dan LC boleh memilih untuk meneruskannya, jika dan apabila keperluan itu berbangkit. Berhubung tanggungannya, LC tidak terhutang apa-apa kepada defendan di bawah keadaan tersebut. Ketidakupayaannya untuk meneruskan projek tersebut adalah sesungguhnya kesalahan defendan dan akibat dari keingkaran defendan di bawah perjanjian usahasama tersebut, bagi yang mana LC tidak seharusnya dipertanggungjawabkan (lihat ms 560B–D). Pencelah yang dicadangkan telah tidak menunjukkan bahawa ia telah memenuhi ujian yang dirumuskan dalam *Pegang Mining* untuk mengucul mahkamah supaya melaksanakan budi bicaranya dalam membenarkannya untuk menyertai di dalam prosiding tersebut (lihat ms 560D).]

A **Notes**

For cases on intervention generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4208–4236.

B **Cases referred to**

Arab Malaysia Merchant Bank Bhd v Jamaluddin bin Dato Mohd Jarjis [1991] 2 MLJ 27 (refd)

News Ltd v Arl (1996) 139 ALR 193 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (folld)

C *Soo Hong & Leong Kew Hoi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690 (folld)

Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)

Legislation referred to

D Housing Developers (Control and Licensing) Act 1966 ss 7(7), 7A

Rules of High Court 1980 O 15 r 6(2)(b), O 49, O 53 r 4(2)

Rules of the Supreme Court [Eng] O 15 r 6(2)(b)(i), O 53 r 5(3)

P Latsmanan (*Khor Gaik Thiam & Latsmanan*) for the intervener.

Azmi Ani (*Raja Eleena Siew Ang & Associates*) for the plaintiff.

E *KL Choy* (*KL Choy & Co*) for the defendant.

Abdull Hamid Embong J: Enclosure 10 is an application by the intervener, Lingkaran Cemerlang Sdn Bhd ('LC') to be enjoined as a second defendant in this suit, pursuant to O 15 r 6(2)(b) of the Rules of High Court 1980 ('the RHC') or under its inherent power.

F On 1 August 2001, this court had allowed the plaintiff on its ex parte application, an interim injunction restraining the defendant from paying out or causing to be paid out any monies deposited into its Housing Development Account ('HDA account') in respect of the development of a housing project known as Taman Raja Ekram ('the project') or to deal with or dispose or encumber the monies available in the HDA account until G disposal of this suit. That ex parte injunction has now been extended till 12 October 2001, being the date fixed for arguments inter partes.

Briefly, the facts are as follows. The plaintiff is the registered owner of land known as Lot 70065 Mukim Ulu Kinta. On 14 April 1986, the plaintiff entered into a joint venture agreement with one Syarikat Perumahan Sejati H Sdn Bhd ('Sejati') to develop the land into a housing estate. On 18 April 1996, Sejati assigned all their rights by a deed of novation cum assignment to the defendant whereby the defendant agreed to construct and complete the balance of 344 units of single storey houses, 121 units of double storey shophouses and further to develop 5.32 acres of the land into a commercial area. The houses and shophouses were to be completed within 24 months I from December 1998. The project, however, faced problems, and its completion was delayed. The plaintiff gave the defendant a number of extensions to complete the project. On 22 May 2001, the plaintiff

terminated the joint venture agreement and demanded that the defendant stop all work immediately. A

On 19 July 1997, by a turnkey agreement, the defendant appointed a turnkey contractor, ie one LSSB, to build and complete the 65 units under phase 1B of the project. Under that turnkey agreement, the defendant would receive 30% of the 65 units whilst LSSB would get 44 units, ie 70%. Subsequently, on 24 April 2000, LSSB and another company, ie Pembinaan Alaf Cemerlang Sdn Bhd entered into a joint venture agreement to build the 65 units on a 50–50 sharing basis of the 44 units given to LSSB under its turnkey contract with the defendant. A new company, ie LC, the intended intervener, was set up under that joint venture agreement to complete Phase 1B of the project. B C

According to LC, the 65 units built under Phase 1B are now almost completed and awaiting approval from Lembaga Air Perak before the certificates of occupation ('OC') are issued by the local authority. LC had also incurred expenditure in undertaking the building works and various payments made to government departments and other authorities. On 9 June 2001, pursuant to the termination of the contract by the plaintiff, LC's representatives and workers were stopped from entering the project site and as such could not finish the remaining works. LC also stated in support of this application that the temporary freezing of the HDA account by the plaintiff had prejudiced its rights and interest since LC had a legal interest in Phase 1B and is responsible to the defendant under the turnkey agreement to deliver vacant possession of the 65 units to it. It was not disputed that the HDA account was opened and maintained for the purpose of Phase 1B. Since some units in Phase 1B have been sold and part payments have been made into the HDA account, LC, with the freezing of that account is unable to draw out the monies to make various payments to its suppliers and workers. Also, it was contended that the plaintiff itself as the registered landowner and a party to the sale and purchase agreements with the house purchasers, was aware that the completion dates of the houses under Phase 1B was no earlier than November 2001, and not by 31 December 2000 as contended by the plaintiff. It was also contended that the plaintiff had induced LC to extend the completion dates. As such, it was not right for the plaintiff to terminate its agreement with the defendant since there had been no delay in completing phase 1B of the project. D E F G

In further submissions, learned counsel for LC said that although it was not disputed that there was no privity of contract between LC and the plaintiff, this question was not a basis for its application to intervene. Further, the plaintiff was aware of LC's appointment as the turnkey contractor and had impliedly consented to it. H

Learned counsel for the plaintiff, in opposing this application, submitted that the plaintiff had no dealing with LC and was not aware of or consented to LC's appointment as the turnkey contractor (referring to the plaintiff's letter objecting to LC's appointment in exh N1 of encl 14). There was no mention of the appointment of a turnkey contractor in the joint venture agreement with the defendant, and as such LC's appointment was I

done without the plaintiff's consent and was therefore in contravention of the joint venture agreement since LC was allowed to participate in the profit sharing in the project. The plaintiff maintained that the completion date to Phase 1B was 31 December 2000, and that the dates mentioned in the sale and purchase agreements with the house buyers had no effect on the date as agreed to under the joint venture agreement. It was also submitted that LC's legal obligation was with the defendant and that it had no connection with the plaintiff. With the termination of the Joint Venture Agreement ('the JVA'), the defendant no longer became the developer of the project and so could not manage the HDA account. The monies in the said account should revert to the plaintiff as a result of the termination and could be taken over by a new developer. Under s 7A of the Housing Developers (Control and Licensing) Act 1966 (the HDA'), it is the statutory duty of a housing developer to open and maintain a HDA account. LC, it was submitted has no right to deal with that account and as such, its freezing was of no concern to LC.

Criterion for intervention

Leave to intervene is granted at the court's discretion. In considering whether to allow this application or not, this court is guided by the test enunciated by the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, which has been followed in two decisions of our apex court in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63 and *Arab Malaysia Merchant Bank Bhd v Jamaluddin bin Dato Mohd Jarjis* [1991] 2 MLJ 27, and a host of other decisions in the High Courts and Court of Appeal. This test may be stated by quoting a short passage from the advice of the Privy Council in *Pegang Mining*. It states:

> A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be *directly affected* by any order which may be made in the action? (Emphasis added.)

A starting point to consider is by referring to O 15 r 6(2)(b) of the RHC, under which this application is made. It states:

> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely:
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> (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; ... .

The object of the rule can immediately be discerned from the abovementioned rule, and as put by Lord Denning MR in *Gurtner v Circuit* [1968] 1 All ER 328:

> It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome.

This passage essentially repeats what is stated in the English Rules of the Supreme Court O 15 r 6(2)(b)(i), which is in pari materia with our equivalent rule. Another principal object of the rule is as was stated by Lord Diplock in *Pegang Mining* which is 'to enable the court to prevent injustice being done to a person whose rights will be effected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity to be heard.' The Privy Council opined that a flexible approach was called for, but refused to lay down any general proposition for universal application since each case should be decided on its own facts.

Looking at these authorities, both domestic and foreign, including the recent Court of Appeal decision of *Soo Hong & Leong Kew Hoi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690, which confirmed the *Pegang Mining* test, one factor that came out in consonance to qualify the 'rights against or liabilities to' test is that the intervening party must have been 'directly affected' by any order made by the court on the subject matter. This qualification was formulated by the Privy Council in *Pegang Mining*, and as stated by the Court of Appeal in *Soo Hong* remains applicable today in our jurisdiction. The qualifying words 'directly affected' have yet to be interpreted by our courts. According to *Stroud's Judicial Dictionary of Words and Phrases* (6th Ed) these two words are defined (in the context of the RSC O 53 r 5(3) (equivalent to O 53 r 4(2) of the RHC) as follows:

> A person is 'directly affected' if he is affected without the intervention of any intermediate agency so that the Secretary of State was not 'directly affected' within the meaning of O 53 r 5(3) and could not be joined as a party even though a local authority was required by virtue of a decision in judicial review proceedings to pay housing benefit to an applicant, and the Secretary of State had a collateral obligation therefore to increase the authority's annual housing benefit subsidy (*R v Rent Officer Service ex p Muldoon* [1996] 1 WLR 1103).

It would seem from this definition that one cannot be said to be directly affected by an order of court if such affection is brought about by an intermediary. As Lord Keith of Kinkel, speaking for the House of Lords in *ex p Muldoon* puts it:

> That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.

The qualification as stated in the *Pegang Mining* test was recently considered by the full court of the Federal Court of Australia in its decision in *News Ltd v Arl* (1996) 139 ALR 193 which expressed the following view on this particular aspect of the test:

> In our opinion, the question should be decided according to the test proposed by Lord Diplock. The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be *directly* affected (emphasis by the Federal Court). The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or a lesser extent. This is particularly so with remedies in the nature of an injunction: see *Silktone Pty Ltd v Devreal Capital Pty Ltd* (1990) 21 NSWLR 317 at p 322, per Kirby P. The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential.

Back to the instant case. It is common ground that LC had no privity of contract with the plaintiff. In fact, LC's appointment as a turnkey contractor was a bone of contention and a basis for the plaintiff's termination of the joint venture agreement with the defendant.

As for the HDA account, it is clear from s 7A of the HDA that the defendant was under a statutory obligation to open and maintain this account. Under s 7A(2) of the HDA, it is provided that the defendant, as the licensed housing developer, needs to open and keep an HDA account for each of the phases of development in the case where a housing development is to be developed in phases. Learned counsel for LC had also submitted that the effect of freezing this HDA account is tantamount to its garnishment under s 7(7) of the HDA, but in my view, this argument is erroneous since garnishment is a separate execution process under O 49 of the RHC which is a consequence of a money judgment already obtained, and where the garnishee is indebted to the judgment debtor.

It was also not disputed that LC had no link to the HDA account. It's complaint is that it could not now draw on that account to make payments to its suppliers and workers. However, even without the restraint now put on the HDA account, LC could not put its hand on it. It is the defendant, as the licensed housing developer, and the defendant alone, that can draw on that account.

The question that needs to be answered now is whether LC is directly affected by the freezing of the HDA account. This is now the central issue for consideration. Although LC's lack of contractual relationship with the plaintiff is irrelevant, reference is made to it to demonstrate the peculiar facts of this case. In my view, based on the abovecited authorities, the answer can only be in the negative. It is clear, from the facts, that LC, although entitled to the monies in the HDA account, and may participate in that account through an intermediary, ie the defendant, is not so directly affected by this court's earlier order. As such, LC does not fall within the class of persons as contemplated by *Pegang Mining's* test. The effect of freezing the HDA account on LC is, as stated by the Australian Federal Court in *News Ltd v Arl*, merely consequential. As was also stated by that court, 'many orders of a court are likely to affect people to a greater or lesser extent — particularly so with remedies in the nature of an injunction'. LC

would certainly be affected by this court's earlier interim order and it may be said that it would inevitably be affected. But, in my view LC would only be indirectly affected by reason of his collateral obligations and rights under its turnkey agreement with the defendant. It seems to me that LC's interest is merely a commercial one and this barely suffices to enjoin it as a party to this action.

Next, to consider LC's legal interest ie, its 'rights against or liabilities to'. The rights referred to in the test is a right at law and not a right in equity, as was submitted by LC's learned counsel. His argument that LC had an equitable interest in the HDA account is unfortunately misconceived. That LC had no rights to the HDA account needs no further elaboration as this has been considered earlier. LC's rights against the defendant is however, not affected and LC may choose to pursue it, if and when that need arises. As for its liability, this court favours the submissions of learned counsel of the plaintiff who said that LC does not owe any to the defendant under the circumstances. Its inability to proceed with the project is entirely the fault of the defendant and a consequence of the defendant's breach under the joint venture agreement, for which LC should not be held responsible.

In conclusion, and shortly put, the intended intervener here had not shown that it has met the test formulated in *Pegang Mining* to move this court to exercise its discretion in allowing it to participate in this proceedings.

For these reasons, leave to intervene is denied and this application is dismissed with costs.

Application for leave to intervene dismissed with costs.

Reported by Chew Phye Aun